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In The

SUPREME COURT OF THE UNITED STATES

October Term, 1971

No. 71-247

WILLIAM RABE,

Petitioner,

vs.

STATE OF WASHINGTON,

Respondent,

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF OF MORALITY IN MEDIA INC., AS AMICUS CURIAE

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In The

SUPREME COURT OF THE UNITED STATES

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WILLIAM RABE,

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vs.

STATE OF WASHINGTON,

Respondent,

MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE

Morality In Media Inc. hereby respectfully moves for leave to file as Amicus Curiae in this case the brief appended hereto. The consent of the Attorneys for the Respondent has been refused since said Attorneys had previously refused a request for the filing of Amicus briefs by the Motion Picture

Association of America, Inc. and the National Association of Theatre Owners, Inc. Attorneys for Respondent, however, urged movant to enter the case as Amicus through the medium of a Motion for Leave to File Brief. Counsel for Petitioner is unwilling to consent and suggests that it should be left to this Court to decide whether Amicus briefs should be received.

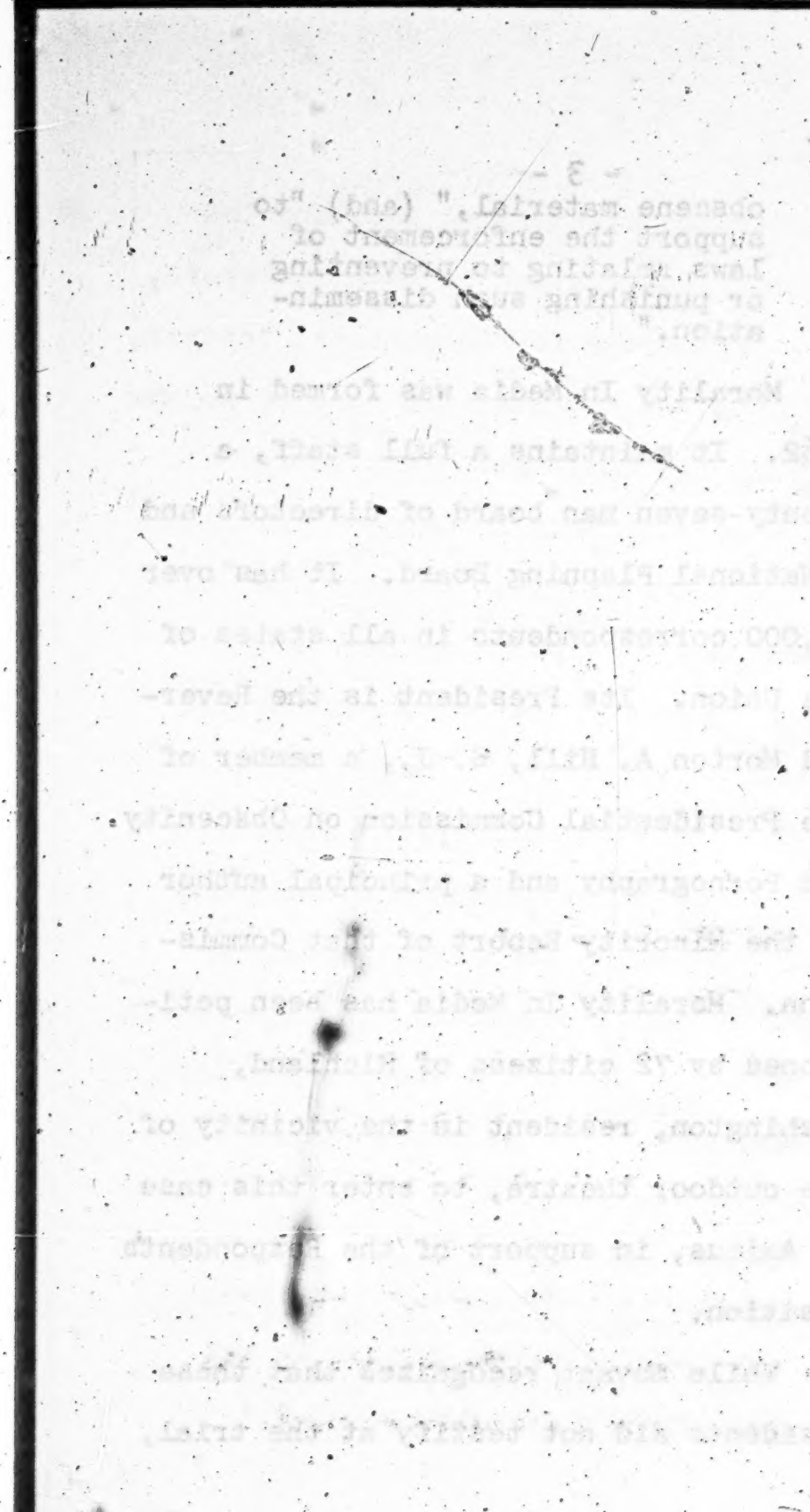
Morality In Media is an Interfaith charitable organization with National Headquarters at 487 Park Avenue, in New York City, organized as a membership corporation under the laws of the State of New York. The purposes of the Organization are:

> "to initiate, promote, encourage and coordinate activities designed to safeguard and advance public morality, combat community and family deterioration through * * * preventing the sale of * * *

obscene material," (and) "to support the enforcement of laws relating to preventing or punishing such dissemination."

Morality In Media was formed in 1962. It maintains a full staff, a twenty-seven man board of directors and a National Planning Board. It has over 35,000 correspondents in all states of the Union. Its President is the Reverend Morton A. Hill, S. J., a member of the Presidential Commission on Obscenity and Pornography and a principal author of the Minority Report of that Commission. Morality In Media has been petitioned by 72 citizens of Richland, Washington, resident in the vicinity of the outdoor theatre, to enter this case as Amicus, in support of the Respondent's position.

While movant recognizes that these residents did not testify at the trial,



and that any objection that they may have is not part of the record to be considered on appeal, nevertheless, they would appear to have a sufficient interest in the outcome of these proceedings to petition this honorable Court to enter this case as Amicus or request others to do so.

Because Morality In Media believes that certain issues raised by this case, for example, whether utterly without redeeming social value is, or is not, a constitutionally required test for obscenity and the constitutional restrictions, if any, on the states right to prohibit "intrusive" motion pictures, are of the most vital concern to all of the people of the United States and have not been adequately covered in the briefs of the parties, it respectfully requests

permission to file the within Brief Amicus Curiae.

Respectfully submitted,
CONSTANTINE REGUSIS,
Attorney for Morality
In Media Inc.,
Amicus Curiae

Paul J. McGeady
of Counsel

ARGUMENT

I.

THERE WAS NO ERROR IN CONVICTING PETITIONER OF A VIOLATION OF THE GENERAL OBSCENITY STATUTE OF THE STATE OF WASHINGTON SINCE "CARMEN BABY" IS OBSCENE BY STANDARDS ESTABLISHED BY THIS COURT.

The pertinent statute of the State of Washington, RCWA 9.68.010 (2), provides that every person who causes to be exhibited a "motion picture" * * * "which is obscene" * * * "shall be guilty of a misdemeanor". The word "obscene" is not further defined. Under the rationale therefore, of the Butler[1], Roth [2] and Kingsley [3] Cases,

---

1. Butler v. Michigan, 352 U.S. 380 (1957)
2. Roth v. United States and Alberts v. California, 354 U.S. 476 (1957)
3. Kingsley International Pictures Corp. v. Regents 360 U. S. 684 (1959)

We must look to the decisions of this Court for the meaning of that word when used in a State criminal statute. There is only one Supreme Court Opinion where "obscene" is defined. This is the familiar Roth Case.

Justice Brennan, speaking for a majority of the Court in that case said at 354 U. S. 481:

> "The dispositive question is whether obscenity is utterance within the area of protected speech and press. Although this is the first time the question has been squarely presented to this Court * * * expressions found in numerous opinions indicate that this Court has always assumed that obscenity is not protected by the freedoms of speech and press" (quoting 10 prior Supreme Court cases) * * *.
>
> "It is apparent that the unconditional phrasing of the First Amendment was not intended to protect every

utterance." * * *

"All ideas having even the slightest social importance - unorthodox ideas, controversial ideas, even ideas hateful to the prevailing climate of opinion -- have the full protection of the guaranties, unless excludable because they encroach upon the limited area of more important interests. But implicit in the history of the First Amendment is the rejection of obscenity as utterly without redeeming social importance. This rejection for that reason is mirrored in the universal judgment that obscenity should be restrained reflected in the international agreement of over 50 nations, in the obscenity laws of all of the 48 states and in the 20 obscenity laws enacted by Congress, from 1842 to 1956. This is the same judgment expressed, by this Court in Chaplinsky vs. New Hampshire, 315 U.S. 568 * * * "

"* * * There are certain well defined and narrowly limited classes of speech, the prevention and punish-

> ment of which have never been thought to raise any constitutional problem. These include the lewd and obscene . . . It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality" (Emphasis supplied by the Court.)
>
> * * *
>
> "We hold that obscenity is not within the area of constitutionally protected speech or press. * * *
>
> "Sex and obscenity are not synonymous. Obscene material is material which deals with sex in a manner appealing to prurient interest."

The Court then refers us to a footnote for the definition of "prurient interest":

> "i. e. material having a tendency to excite lustful thoughts. * * * we perceive no significant difference

> between the meaning of obscenity developed in the case law and the definition of the American Law Institute Model Penal Code * * * viz. 'a thing is obscene, if, considered as a whole, its predominant appeal is to prurient interest i. e. a shameful or morbid interest in nudity, sex or excretion and if it goes beyond substantially beyond customary limits of candor in description or representation of such matters . . ."

Finally, the Court gives us this test:

> "Whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest."

* * *

In the Roth Case, this Court quotes with approval the trial Judge's charge to the jury reading as follows:

> " '. . . the test is not whether it would arouse

sexual desires or sexual impure thoughts in those comprising a particular segment of the community, the young, the immature, or the highly prudish or would leave another segment, the scientific or highly educated or the so-called worldly-wise and sophisticated indifferent and unmoved . . . the test in each case is the effect of the book, picture or publication considered as a whole, not upon any particular class, but upon all those whom it is likely to reach. In other words, you determine its impact upon the average person in the community. The books, pictures and circulars must be judged as a whole, in their entire context and you are not to consider detached or separate portions in reaching a conclusion. You judge the circulars, pictures and publications which have been put in evidence by the present-day standards of the community. You may ask yourselves does it offend the common conscience of the community by present-day standards.'"

"In this case, ladies and gentlemen, you and you alone are the exclusive judges of what the common conscience of the community

> is, and in determining that conscience you are to consider the community as a whole, young and old, educated and uneducated, the religious and irreligious -- men, women and children.'"

Justice Harlan, in his concurring opinion, in the Alberts Case, at 354 U. S. 501 states:

> "It seems to me clear that it is not irrational, in our present state of knowledge to consider that pornography can induce a type of sexual conduct which a State may deem obnoxious to the moral fabric of society. * * *
>
> "Furthermore, even assuming that pornography cannot be deemed ever to cause, in an immediate sense, criminal sexual conduct, other interests within the proper cognizance of the States may be protected by the prohibition placed on such materials. The state can reasonably draw the inference that over a long period of time the indiscriminate dissemination of materials, the essential character of which is to degrade sex, will have an eroding effect on moral standards. * * *"

"Since the domain of sexual morality is preeminently a matter of State concern, the Court should be slow to interfere with State legislation calculated to protect that morality."

COMMENT

The Roth-Alberts decision is of the greatest importance not only because it firmly decided that obscenity is proscribable both under state and federal law, but because it is the only decision of the United States Supreme Court which sets forth the test for obscenity.

We read that Court decision as standing for the following propositions:

1. The test for obscenity is

"Whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to the prurient interest."

2. Once material is adjudged to be obscene by a jury

(or judge) applying this test or its equivalent then, since it is obscenity, it is conclusively presumed as a matter of law to be "utterly without redeeming social importance."

3. Such lewd and obscene utterances may have some "social value" but, "any benefit that may be derived from them is clearly outweighed by the social interest in order and morality."

4. Obscenity is not protected free speech.

5. A charge to the jury that includes only the prurient interest test (or its equivalent) is constitutionally valid.

6. A statute proscribing "obscene" or "lewd" material is sufficiently precise.

7. Since obscenity is not protected free speech it is unnecessary to prove that it will "create a clear and present danger of anti-social conduct or will probably induce its recipients to such conduct."

8. The legal basis for obscenity laws is the "social interest

> in order and morality" or the prevention of "an eroding effect on moral standards."

There are various lower court decisions which have taken a later decision entitled, A Book Named Memoirs of A Woman of Pleasure vs. Attorney General 383 U. S. 413, (1966) as a modification of the Roth Case. However, it should be noted that the Court Reporter at 16 L.Ed. 2d. 1 states:

> "The * * * members of the Court * * * did not agree upon an opinion."

Justice Clark succinctly summarizes what happened in "Fanny Hill" when he said at 383 U. S. 441:

> "While there is no majority opinion in this case, there are three justices who import a new test into that laid down in Roth, namely that 'a book cannot be proscribed unless it is found to be utterly without redeeming social value'. I agree

with my Brother White that such a condition rejects the basic holding of Roth and gives the smut artist free rein to carry on his dirty business. My note in that case -- which is the deciding one for the majority opinion -- was cast solely because the Court declared the test of obscenity to be:
'whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest.'
I understood that test to include only two constitutional requirements: (1) the book must be judged as a whole, not by its parts; and (2) it must be judged in terms of its appeal to the prurient interest of the average person, applying contemporary community standards. Indeed, obscenity was denoted in Roth as having 'such slight social value as a step to truth that any benefit that may be derived . . . is clearly outweighed by the social interest in order and morality'. Moreover, in no subsequent decision of this Court has any 'utterly without redeeming social value' test been suggested much less expounded. The first reference

to such a test was made by my Brother Brennan in Jacobelis vs. Ohio * * * seven years after Roth in an opinion joined only by Justice Goldberg. * * * "
(Emphasis supplied)

Justice White, in his opinion in Fanny Hill, at 383 U. S. 460, stated:

"In Roth vs. United States * * * the Court held a publication to be obscene if its predominant theme appeals to the prurient interest in a manner exceeding customary limits of candor. Material of this kind, the Court said, is 'utterly without redeeming social importance' and is therefore, unprotected by the First Amendment.

"To say that material within the Roth definition of obscenity is nevertheless not obscene if it has some redeeming social value is to reject one of the basic propositions of the Roth Case -- that such material is not protected because it is inherently and utterly without social value.

"If 'social importance' is to be used * * * obscene material, however, far beyond customary

limits of candor, is immune if it has any literary style, if it contains any historical references or language characteristic of a bygone day, or even if it is printed or bound in an interesting way. Well written, especially effective obscenity is protected; the poorly written is vulnerable.

"A fortiari, if the predominant theme of the book appeals to the prurient interest as stated in Roth, but the book nevertheless contains here and there a passage descriptive of character, geography, or architecture, the book would not be 'obscene' under the social importance test. I had thought that Roth counseled the contrary: that the character of the book is fixed by its predominant theme and is not altered by the presence of minor themes of a different nature. The Roth Court's emphatic reliance on the quotation from Chaplinsky * * * means nothing less: * * * 'Such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and

morality'. (Emphasis supplied by Justice White.)

"In my view 'social importance' is not an independent test of obscenity but is relevant only to determine the predominant prurient interest of the material, a determination which the Court or the jury will make based on the material itself and all the evidences of the case, expert or otherwise."

COMMENT

The promotion of the opinion of Brennan-Warren and Fortas as a Court opinion that modified the Roth case has been both deceitful and insidious. Many states were urged to and did modify their obscenity statutes to build in a rule that actually contradicted the Supreme Court's holding in the Roth Case and the Roth test and today we are paying ten-fold for our lack of vigilance. Justice Clark's prophetic statement in the Fanny Hill case we

know now is true. He said such a condition "gives the smut artist free rein to carry on his dirty business." It is quite obvious that Justice Clark and White are correct when they say in Fanny Hill that there is no such test. We submit that "utterly without redeeming social importance"is not part of the definition of the word "obscene" nor part of the test for obscenity for the following reasons:

(1) There is no Court opinion in "Fanny Hill" and the opinions of three Judges out of nine do not constitute a binding precedent so as to require any court or Legislature to follow their suggestions. It is not the law of the land.

(2) Roth is a Court opinion and it does not use the phrase as part of the test for obscenity.

(3) Once the Roth test is applied to a disputed work and it is decided to be "obscene" then Roth conclusively presumes

the material to be utterly without redeeming social importance.

(4) Roth says obscenity has social value, but that value is outweighed by the interest in morality. Three Justices in Fanny Hill say if it has any social value it is not obscene. This contradicts Roth in an essential manner and is in error.

(5) The charge to the Jury approved in the Roth case did not have a "social value" or "social importance" or "Utterly without redeeming social value" test or phrase. Since Roth is still the only Supreme Court opinion on the definition of obscenity, then no social value "test" need be given to any Jury nor be made part of any statute. If it were a necessary charge to the Jury, Roth would have insisted upon it.

If further proof is needed that the Memoirs (Fanny Hill) three Justices opinion is not a precedent binding on anyone, it may be found in opinions of the United States Supreme Court itself.

In 29 American Jurisprudence Second at Section 195 of the topic "Courts", we find the following:

> "A decision by an equally divided court does not establish a precedent required to be followed under the stare decisis doctrine. And where the members of the court unanimously or by a majority vote reach a decision but cannot even by a majority agree on the reason therefor, no point of law is established by the decision and it cannot be a precedent covered by the stare decisis rule." (Emphasis supplied.)

As authority for this statement, American Jurisprudence quotes the United States Supreme Court case of United States v. Pink, Superintendent of Insurance of the State of New York 315 U. S. 203, (1941).

Referring to that case, we find the following rule:

> "Nor was our affirmance of the judgment in that case by

> an equally divided court an authoritative precedent. * * * The lack of an agreement by a majority of the court on the principles of law involved prevents it from being an authoritative determinate for other cases. Hertz vs. Woodman, 218 U.S. 205, 213-214."

In the Hertz Case, the United States Supreme Court made it crystal clear when it said:

> "The principles of law involved not having been agreed upon by a majority of the Court sitting prevents the case from becoming an authority either in this or in inferior courts." (Emphasis supplied).

Applying this to the Memoirs Case, it is quite clear that three is not a majority and therefore, in the words of this honorable Court, this prevents that case "from becoming an authority either in this or in inferior courts."[4]

4. Richard G. Kleindienst, the Deputy

Assuming that the "amorphus" test of "utterly without redeeming social value" is not part of the test for obscenity, does "Carmen Baby" meet the Prurient Interest test? Does it also go "substantially beyond the limits of candor?" The answer to this can be found in the opinion of the Supreme Court of the State of Washington below[5] when at 484 P. 2d. 922, Justice McGovern speaking in a majority Court opinion states:

F.N. 4 (Continued)
Attorney General of the United States on April 28, 1971, in a letter addressed to Hon. Thaddeus J. Dulski, Chairman of the House Committee on Post Office and Civil Service in commenting on Bill No. HR 2159, 92nd Congress, First Session (later passed overwhelmingly by the House and Referred to the Senate) which would define "obscene" as used in the Federal Statutes to make it clear that "utterly without redeeming social value" was not part of that definition stated:

F.N. 4 (Continued)

"We believe that the elimination of the 'social value' aspect may withstand constitutional scrutiny. It is well established that a plurality opinion is not binding precedent."

"While we recognize that congressional enactment of a definition of what is obscene and, therefore, not afforded the full protection of the First Amendment, would not be binding upon the Supreme Court, we have no objection to such an enactment as a statement of Congressional intent." (Hearings before the Sub-Committee on Postal Facilities and the mail of the Committee on Post Office and Civil Service - April 28; May 5, 1971 -- Serial No. 92 - 6 - U.S. Government Printing Office); See Also "The Social Value Hoax", May - June, 1971 issue of "The Prosecutor", magazine of the National District Attorney's Association.

> "We have considered the film 'Carmen Baby' with strict attention to those legal touchstones and assert that the dominant theme of the motion picture appeals to the prurient interest: the quantity and variety of sexual acts implied or expressly shown on the screen is out of proportion to its necessity or its part in the film's theme."

It is submitted that in addition to confirming that the dominant theme appeals to the prurient interest, the Court by this statement clearly indicated that it went beyond the limits of candor. This later fact is additionaly emphasized by the description of the scenes from the motion picture as described by the police officer in the Justice Court, and

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5. State vs. Rabe, 79 Wash. 2d. 254, 484 P. 2d. 917 (1971).

the description contained in the October 7, 1968, decision of Justice Yencopal.

Amicus respectfully submits that Justice McGovern's reference to the binding effect of Jacobellis[6] and Memoirs[7] is mistaken for the simple reason that neither of them enunciate a court opinion. They are simply cases, containing decisions on the facts of their cases and individual non-binding opinions of individual justices. In addition the individual justices opinions relied on contradict Roth in a fundamental manner and are, therefore, in error.

It is respectfully urged that this court take this opportunity to

6. Jacobellis vs. Ohio, 378 U. S. 184 (1964)
7. 383 U. S. 413 (1966)

reiterate Roth as the sole test for obscenity unencumbered by subsequent no-majority cases.

II. PRIOR ADVERSARY HEARING NEED NOT PRECEDE THE SEIZURE OF A MOTION PICTURE AS EVIDENCE IN A CRIMINAL TRIAL OF THE EXHIBITOR

In addition to the analysis of this point made by the Court below, in which Amicus concurs, we desire to bring to the Court's attention the fact that the constitutional basis for the contentions advanced in such cases as United States v. Alexander, 428 F. 2d. 1169 (8th Circuit 1970) and Demich Inc. v. Ferdon, 426 F. 2d. 643 (9th Circuit 1970) has disappeared with this Court's decision in United States v. Thirty-Seven Photographs, 402 U. S. 363 (May 1971). In that case, customs agents seized a quantity of allegedly obscene material

and within two weeks commenced forfeiture proceedings. A three judge Federal District Court ruled the seizure illegal because of failure to obtain prior judicial approval. This Court reversed noting that the forfeiture proceedings began within fourteen days and concluded within sixty days. The instant proceeding was began by Judge Yencopal issuing a warrant on August 30, 1968, a denial of a motion to suppress the seized film on September 27, 1968, and a final determination that the film was obscene on October 7, 1968. This timing is well within the sixty-day limit set down in U. S. v. Thirty-Seven Photographs.

Other Federal cases relied upon by Petitioner are Astro Cinema Corp. Inc. vs. Mackell, 422 F. 2d. 293 (2nd Cir. 1970), and Bethview Amusement Corp.

v. Cahn, 416 F. 2d. 410 2nd Circuit 1969) cert. denied, 397 U. S. 920 (1970). These cases were recently considered in a December 1, 1971 decision of the New York Court of Appeals (5 to 2) in the case of People v. Saul Heller, N. Y. Law Journal, Page 1, December 16, 1971. In that case, the Court of Appeals states that the above cases requiring prior adversary hearings "go beyond any requirement imposed on state courts by the Supreme Court." The New York Court carefully reviewed the decisions of this Court on judicial scrutiny in obscenity seizure cases and stated as follows:

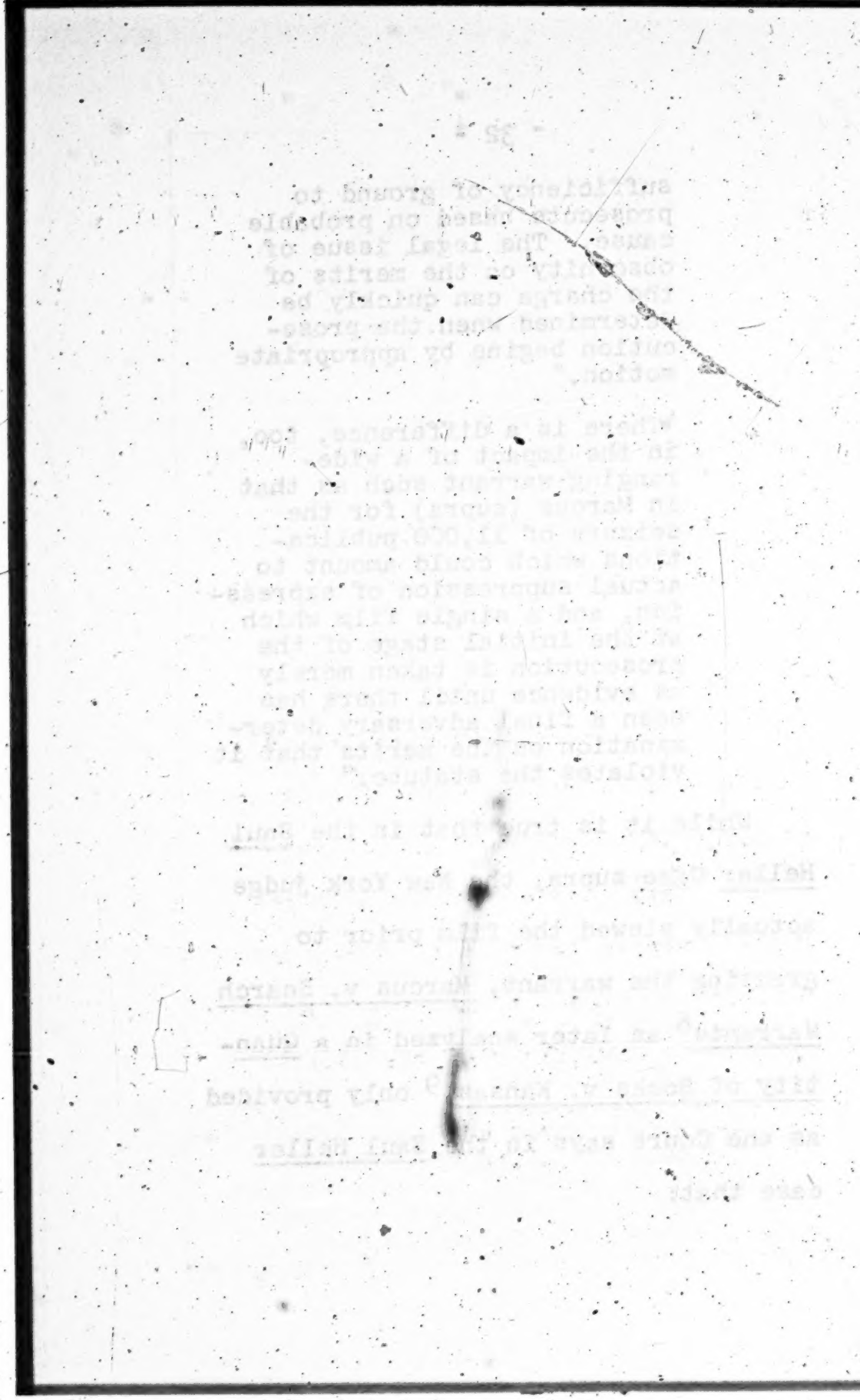
> "The warrants involved here were preceded by judicial scrutiny and were the result of a judicial determination. The additional question is whether the scrutiny should have been followed by an adversary hearing. The

Supreme Court has not held that; and its most recent comment on the problem suggests it is not moving in that direction. (Lee Art Theatre v. Virginia, 392 U. S. 636 (1967)." * * * "What is of relevancy for the present case is the observation by the Supreme Court that 'We need not decide in this case whether the justice of the peace should have viewed the motion picture before issuing the warrant' (p. 637) This implies that had the Justice done so, as the judge in the present case did, it would have been sufficient. There is no suggestion that an adversary hearing, an extreme departure from standard American practice on warrants, would also have been required"* * *.

"There are intrinsic procedural difficulties in requiring such hearings. The usual reason for an adversary hearing before a magistrate as to whether a warrant should or should not issue arises from a close issue as to whether there is a real basis in fact for probable cause to being" (bring?) "a prosecution***. He is deciding, on the warrant question, not guilt or innocense, but the prima facie

> sufficiency of ground to prosecute based on probable cause. The legal issue of obscenity on the merits of the charge can quickly be determined when the prosecution begins by appropriate motion."
>
> "There is a difference, too, in the impact of a wide-ranging warrant such as that in Marcus (supra) for the seizure of 11,000 publications which could amount to actual suppression of expression, and a single film which at the initial stage of the prosecution is taken merely as evidence until there has been a final adversary determination on the merits that it violates the statute."

While it is true that in the Saul Heller Case supra, the New York judge actually viewed the film prior to granting the warrant, Marcus v. Search Warrants[8] as later analyzed in a Quantity of Books v. Kansas,[9] only provided as the Court says in the Saul Heller case that:



> "the seizure of evidence as obscene, and arrests on this ground, should not be left to the judgment of policemen, but should have judicial supervision."

In the instant case, the record shows that the Justice of the Peace actually took testimony from the police officer about the obscene nature of the film and reached an independent judgment based on his judicial determination that there was probable cause to issue the warrant. He was not required at this preliminary stage to decide the issue of obscenity. Marcus does not require an adversary hearing nor does it require a particular mode of judicial scrutiny such as a requirement that the magistrate actually view the film.

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8. 367 U. S. 717 (1961)
9. 378 U. S. 205 (1964)

It should also be reiterated that only one copy of the film was seized for the purpose of evidence and it should be further noted that the broad statement in Marcus and A Quantity of Books [10] as interpreted above in Saul Heller requiring judicial scrutiny does not apply to all obscene seizures especially those involving copies seized for evidence such as a single copy of a film or a few copies of a book.

State vs. Hartstein, 469 S. W. 2d. 329, a recent 1971 decision of the Supreme Court of Missouri, states that if a seizure is made for purpose of destroying the thing seized and for the purpose of preventing dissemination of the material involved, an adversary hearing on issue of obscenity is required prior to seizure, but if, single

10. A non-majority opinion.

copy of film is seized for sole purpose of preserving it as evidence to be used in criminal action to be brought pursuant to a state statute constitutional on its face, such seizure is not violative of First Amendment guarantees, through seizure coincidentally prevents one particular copy from being further disseminated pending outcome of criminal proceedings. To the same effect is United States v. New Orleans Book Mark Inc., 328 F. Supp. 136 (U. S. District Court La. 1971). In passing, it should be noted that the Missouri Court in Hartstein joined a growing number of state courts in stating "social importance" is not an independent test of obscenity but is relevant only in determing predominant prurient interest of material.

III. STATE STATUTES PROHIBITING EXHIBITION OF OBSCENE FILM MAY BE VIOLATED EVEN THOUGH DISPUTED MATERIAL IS NOT OBSCENE IN THE ABSTRACT IF THE "SETTING" IN WHICH EXHIBITION TAKES PLACE IS CONSIDERED.

In Ralph Ginsburg, vs. United States 383 U. S. 463 (1966), this Court, in a majority opinion, decided that even if disputed material involved was not obscene in the abstract the trial judge's conclusion that the mailing of such material offended the general federal statute proscribing mailing "obscene" publications was sustained where the defendant engaged in the sordid business of pandering. This case may be applied to Rabe vs. Washington 79 Wash. 2d. 254, 484 P. 2d 917 (1971) by observing that that Court considered the "setting" in which the material was

presented as tipping the scale in favor of holding that it violates a proscription against obscenity.[11] See also State ex rel Sensenbrenner v. Adult Book Store 271 N. E. 2d 13, 1926 Ohio App. 2d. 183 (Ohio App. 1971) to this effect and Stanley vs. Georgia, 394 U. S. 557 at 567, (1969) and Papish v. Bd. of Curators, 331 F. Supp. 1321 (1971).

It should be noted that Petitioner's reliance on Jacobellis vs. Ohio, 378 U. S. 184 (1964) is misplaced for the simple reason that there is no Supreme Court Opinion in that case. The Court reporter states that the justices "were unable to agree upon an opinion in support of the decision." [12]

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11. In Ginsburg vs. U. S., the Court at 383 U. S. 465 stated:
"The question of obscenity may include consideration of the setting in which the publications were presented* * *."

Redrup,[13] while a per curiam decision contains no Court Opinion on the applicable definition of obscenity, but to the extent that Petitioner has cited it, it should be noted that the record does show that the prior complaint against Defendant's outdoor movie to the same magistrate by "unwilling individuals"! 14/ How can we assume as petitioner does that the homes facing this intrusive screen were full of willing, consenting (albeit non-paying) adults? See also Bread vs. Alexandria, 341 U. S. 622 relating to invasion of the privacy of the home.

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12. 378 U. S. 184, 12 L.Ed. 2d. 793/ (1964)
13. Redrup vs. New York, 386 U.S. 767 (1967)
14. Joint Appendix to Briefs, page 28, Case of State of Washington v. Rabe (1/9/67)

Closely analogous in principle to the instant case, is Pent - R - Books Inc. vs. United States Postal Service, 328 F. Supp. 297 (U. S. District Ct. E. D. N.Y. June 10, 1971) involving the Postal Reorganization Act of 1970,[15] where at page 307 the Court says:

> "The present complaint deals with matter that is not obscene under the test of Roth vs. United States * * * but that does not prevent the statute from being validly applicable. The fact that the books which are advertised are entitled to First Amendment protection does not mean that the mailer's right to communicate ideas supercedes the right of the addressee (to be let alone) Rowan 397 U. S. at 736, 90 S. St. at 1490. See Bread v. City of Alexandria, 341 U. S. 622 (1951)"

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15. 39 U. S. C. #3010 - 11;
18 U. S. C. #1735 - 37;
Pub. L. 91 - 375

Amicus respectfully claims that the principle in Pent -R- Books and Rowan to the effect that a man is entitled to be free in his home from unwanted intrusion of "Prurient" and "Patently Offensive" material applies in this Rabe Case.

In a sense, Stanley vs. Georgia's protection of a person's right to be secure in his home to view obscenity applies to a co-relative right to be free from the electric bill-board effect of an intrusive obscene screen, viewable from his bed room.

We also draw this Court's attention to its language in Reidel[16] and Thirty-Seven Photographs[17] which implies as B. J. George Jr., Professor of Law and Director of the Center for the Administration of Justice at Wayne

State University in Detroit, states in his article entitled, "The 1970 Supreme Court Term Criminal Law Decisions", New York Law Journal, December 15, 1971, at page 4:

> "*** a trend toward reconsideration of the premise on which Roth is generally taken to rest, namely that the First Amendment itself directly controls what material is subject to regulations and what is not and a recognition that the only legitimate questions under the constitution are whether the regulatory legislation is precise enough in language to pass muster when attacked on vagueness and indefiniteness grounds, and whether procedural due process, including compliance with Fourth Amendment require-

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16. U. S. v. Reidel, 402 U. S. 351 (1971)
17. 402 U. S. 363 (1971)

ments, has been accorded, the particular defendant. This, at any rate, seems to be the discretion (direction?) "in which Reidel and Thirty-Seven Photographs together appear to point."

CONCLUSION

For all of the foregoing reasons, the ruling and judgment of the Court below should be sustained.

Respectfully submitted,
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